

## REPORT OF THE APPEALS PANEL

**Date:** 6 June 2011  
**Appellants:** IP: Ttxnation Ltd (supported by Singtext PTE Ltd, Australia)  
**Complaint Number:** 7502  
**Code version:** 7.4  
**Ad Rules :** 2.3

### 1 INTRODUCTION TO THIS APPEAL

- 1.1 The IP is the only appellant in this matter. We note that although the IP itself is not a South African company, it appears to have submitted to WASPA's jurisdiction.
- 1.2 We note too that the adjudicator decided that it was appropriate to consider all of the IP's responses to the breach notice, prior to and after the emergency panel hearing. The adjudicator's report contains a full and detailed description of each submission and the relevant portions of the Code and therefore we do not intend to reproduce any part of it, other than as referred to in the appeal. We consider the report to be a well-written and logical assessment of the facts.
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### 2 THE HISTORY OF THE MATTER

- 2.1 The Monitor lodged a complaint against the SP claiming that a promotional competition breached section 11.1.2 of the Code, and required an emergency panel hearing. The competition consisted of a promotional competition published on a flyer included in the Citizen newspaper which purported to automatically subscribe a consumer which responded to the short code published on the promotion. The promotion, called "Strike Gold", displays a BMW vehicle prominently along with 2 blocks containing text and a set of terms and conditions on the reverse of the flyer. We continue to use the term "promotional competition" in this report for consistency.
- 2.2 The IP responded with a copy of an opinion it had obtained – commendably – prior to launching the campaign, from a South African firm of attorneys. The opinion claimed that the proposed promotion would not contravene the Code.
- 2.3 The Monitor contended that the advice was not correct and the emergency panel should proceed.
- 2.4 The IP responded again, represented by the same firm, and the Monitor responded to this indicating that as a result of the response, there were in

fact additional breaches of the Code, specifically of sections 4.1.2, 9.1.6 and 11.1.8.

- 2.5 The IP's parent company became involved (from Australia), stating its commitment to fair and transparent dealings with customers and WASPA.
- 2.6 A well-known consumer rights activist and journalist threw her lot into the ring and contacted WASPA regarding the campaign at this time. Her investigations had led her to the IP's call centre, apparently staffed by a foreigner situated outside the country who indicated, in response to various questions, that she "was not allowed to say".
- 2.7 An emergency panel hearing was convened and found that there was a prima facie breach of sections 4.1.2, 11.1.1 and 11.1.2 and that the alleged breaches of sections 9.1.5 and 11.1.8 could be considered by the adjudicator. Several sanctions were imposed which resulted in the service being suspended and the IP confirmed that no further billing would take place pending the outcome of the adjudication.
- 2.8 The IP submitted 2 further representations to the WASPA Secretariat which were taken into account by the adjudicator.

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### 3 DECISIONS OF THE ADJUDICATOR

#### 3.1 *Findings of the adjudicator*

3.1.1 The adjudicator considered the possible breaches of sections:

3.1.1.1 **4.1.2:** Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission;

3.1.1.2 **9.1.6:** Competition and promotional services must not:

(a) use words such as "win" or "prize" to describe items intended to be offered to all or a substantial majority of the participants;

(b) exaggerate the chance of winning a prize;

(c) suggest that winning a prize is a certainty;

(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will definitely have secured that prize.

3.1.1.3 **11.1.1:** Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility or information promoted in that material.

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- 3.1.1.4 **11.1.2:** Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.
- 3.1.1.5 **11.1.8:** Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:
- (a) The name of the subscription service;
  - (b) The cost of the subscription service and the frequency of the charges;
  - (c) Clear and concise instructions for unsubscribing from the service;
  - (d) The service provider's telephone number.
- 3.1.1.6 The adjudicator also considered clause 8 of the Ad Rules.
- 3.1.2 The adjudicator made the following findings:
- 3.1.2.1.1 **4.1.2:** The IP did not knowingly or intentionally deceive the customer. This is because the IP obtained legal opinion prior to the launch of the promotional competition, and required a postal entry to the competition and a text to subscribe to services. There is no breach of 4.1.2.
- 3.1.2.1.2 **9.1.6:** The IP breached this section in that the overall look of the promotional competition gave the impression that winning a prize was a certainty, whereas sending an SMS to the short code would in fact subscribe the consumer to a service for a free week of content, and not entitle the consumer to claim a prize.
- 3.1.2.1.3 **11.1.1:** There was a breach of this section in that the fact that the service that was going to be subscribed to was inadequately described as a subscription service and failed to meet clause 8.2.2.2 of the Ad Rules in relation to display of the cost to subscribe and the terms.
- 3.1.2.1.4 **11.1.2:** The IP was in breach of this section given that a consumer would be likely to be deceived by the wording of the promotional competition, such that he or she would win a prize by sending a message to the short code, rather than that he or she would be subscribed to a service. The adjudicator sets out various references to

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the wording of the promotional competition in support of this finding.

- 3.1.2.1.5 **11.1.8:** On the facts, the adjudicator did not find that the IP was in breach of this section.

### 3.2 *Sanctions*

3.2.1 In imposing sanctions the adjudicator took account of “mitigating and aggravating factors”. As mitigating factors the adjudicator considered the fact that the IP had communicated and co-operated with WASPA and had terminated the subscription service as required by the emergency panel, replacing it with another service. The IP had also taken the precaution of seeking legal advice prior to launching the competition, and had not previously been in breach. As aggravating factors, the adjudicator considered the fact that the campaign was circulated widely and the potential for harm was therefore significant, and the campaign had received negative publicity and had therefore brought the industry into disrepute.

3.2.2 In the circumstances, the adjudicator imposed the following sanctions:

3.2.2.1 The emergency panel orders were confirmed in relation to the cessation of the distribution of the promotional materials after 9 September 2009 and the obligation to retrieve existing materials from distributors and prevent further distribution.

3.2.2.2 In addition, the panel’s order that the mechanism used to enter consumers to competitions and to subscribe consumers to services in the promotional material used, should be terminated.

3.2.2.3 The IP was instructed to send an SMS to all subscribers to the service, at its cost, to advise them that the competition had been cancelled as a result of a WASPA ruling, all subscribers could seek a refund of any fees paid to subscribe (but not to enter the competition as no such fees had been charged), and that no prizes would be awarded.

3.2.2.4 The IP was fined R10, 000 and the Secretariat was directed to bring this matter to the attention of the SP.

3.2.2.5 The various orders were not to be suspended pending the outcome of an appeal.

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## 4 **GROUNDS OF APPEAL**

4.1 The IP appealed through the same attorneys that advised it initially. The grounds of appeal are in essence, the same or very similar to those

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arguments regarding the promotional competition as were put forward in previous correspondence from the IP.

4.2 First, the appeal argues that “it is not practically possible to breach clause 11.1.2” and “consequently the adjudicator erred in finding that there was a breach of clause 11.1.2” because:

4.2.1 “a request by a customer to join a subscription service is in fact independent of that of the competition and the two are entered separately. A request from a subscriber to join the subscription service cannot enter that subscriber into the competition”;

4.2.2 “clause 3 on the reverse of the publication also stipulates: “*unless subscribed to this service, by sending of the initial sms, all entrants will automatically subscribe to the service at a cost of R30 per week*” which clearly relates only to customers who send an sms and consequently customers who post the card will not automatically be subscribed”;

4.2.3 and in addition, “clause 5 provides: “*to be eligible for prospectors gold strike of major gold strike or major strike [sic], the entrant must post an eligible entry card to the address noted in clause 15 before the closure date*”...

4.3 Second, the appeal argues that the adjudicator erred in finding that there was a breach of section 11.1.1 of the Code, because:

4.3.1 “the access number and rate per week are prominently displayed on the top right hand corner of the card identifying the service as a subscription service” and “the words “*subscription service*” are prominently displayed at the bottom right hand corner”;

4.3.2 “the definition on the reverse explains this explicitly” and the definition of service is contained on the reverse of the card”, and “clause 1, 3 and 5 on the reverse of the card emphasise this definition”;

4.3.3 “it is quite clear that the promotion material consists of subscription service [sic] which will be billed at R30 per week”.

4.4 In relation to section 9.1.6, the IP submits that the adjudicator again erred, because:

4.4.1 “the word “entrant” makes it clear that the customer enters into a competition but is not yet a winner”; and

4.4.2 “importantly, the IP was given no notice of this complaint, was given no opportunity to make submissions in respect thereof, and indeed was not even aware of the complaint until receipt of the adjudicator’s report”; and

4.4.3 “consequently, the IP cannot and ought not to be found to have breached this clause”.

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- 4.5 The IP's attorneys, having stunned the panel somewhat with the previous statement which we assume is simply an error since the IP was provided with (i) a copy of the complaint and all related correspondence, and (ii) a copy of the emergency panel's report which refers specifically to section 9.1.6, and which made two further submissions regarding the complaints (5 submissions in total) one month apart, go on to say that the adjudicator failed to take into account:
- 4.5.1 "that to enter the competition the customer does not need to join the promotion/subscription service;
  - 4.5.2 the competition and promotion/subscription have thus two very separate entry mechanisms and are compartmentalised on the card; and/or
  - 4.5.3 the fact that the IP has a fully integrated customer support line operating 24 hours a day; and
  - 4.5.4 the IP's current download statistics indicate that the subscribers on average, visited and downloaded the content on three separate occasions between 28<sup>th</sup> August and 5<sup>th</sup> September 2009. This is strong evidence that the IP's customers are not being deceived or misled, but are fully aware and are actively utilising the Mobilelive content service as opposed to the competition."
- 4.6 The appeal continues, "on the question of onus it is respectfully submitted that the adjudicator could not have found a breach of the aforementioned provisions of the code of conduct on the balance of probabilities".
- 4.7 Additionally, the appeal asks that this panel take account of:
- 4.7.1 "the fact that none of the promotional material which were [sic] the subject matter of the adjudicator's report, were distributed after the 9<sup>th</sup> September 2009 [sic];
  - 4.7.2 the IP has taken active steps to retrieve all copies of the promotional material from any distribution intermediaries;
  - 4.7.3 the promotional material which formed the subject matter of the complaint has been destroyed;
  - 4.7.4 the IP has suspended the mechanism of entering competitions;
  - 4.7.5 the IP has suspended the mechanism of subscribing to services;
  - 4.7.6 the IP sent an sms to subscribers at its own cost advising that the strikegold campaign has been permanently suspended and offered subscribers a chance to request a refund;
  - 4.7.7 the IP sent an sms notice to all entrants to the competition that the competition has been cancelled and that no prizes will be awarded;

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- 4.7.8 the IP has paid the fine of R10,000, the imposition of which, it is submitted is inappropriate, in light of the other grave sanctions imposed”.
- 4.8 Finally, the IP adds that:
- 4.8.1 “it has conducted an internal review of its “Strike Gold Campaign” and in order to clarify its position, both in the mind of the WASPA appeal panel and in the minds of customers, it has implemented the following changes:
- 4.8.1.1 a two-minute delay will be implemented between the “welcome message” and the “contact link message” to allow customers additional time to opt out, before a transaction has occurred, should they not wish to proceed with the promotion subscription;
- 4.8.1.2 a change to the “welcome message” will be implemented to emphasise the opportunity of opting out, should a customer have mistakenly opted into the service”.
- 4.8.2 In this regard, the attorneys for the IP continue to explain how the new promotion and message flow will work, using the same promotional material. Again, the panel must confess to being a little confused about this, given the assertions made by the IP as set out in 4.7.4 and 4.7.5 above.
- 4.8.3 Additional information is presented about how these promotions will be conducted in future which the panel does not consider relevant to the question of the matter before us for consideration. We note, however, that the IP’s attorneys allege that the IP’s “opt-out rate” is less than 1% of cards distributed, and they argue that “this is clear evidence that customers are not deceived, as would be the case if 99% were opting into the service due to the fact that they thought they had won the competition. The IP has furthermore received virtually no customer complaints in this regard.”
- 4.8.4 The balance of the appeal seems to be a request to the panel to approve future forms of advertising (confirmed by clause 4.1.3 of the appeal) which it is not the role of this panel to do and we have not considered clauses 3.11.1 to 3.11. 4 of the appeal as a result.

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## 5 FINDINGS OF APPEALS PANEL

- 5.1 At the outset, we would like to note to the IP’s attorneys that repeating the same arguments many times does not strengthen the arguments and nor is it more persuasive.

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- 5.2 Not only were many of the arguments submitted in the appeal raised in the numerous submissions made by the IP's attorneys prior to the formal adjudication, but they were seriously considered by the adjudicator in the report and each point was addressed by the adjudicator and argument given as to why the point was not accepted. This report has been made available to the IP's attorneys and we are therefore unclear about the reasons why the IP has again stated the same arguments to the panel on the basis that it was unable to do so previously.
- 5.3 The panel is unable to follow some of the arguments made by the IP's attorneys, for example, the arguments that many "subscribers" download content 3 times in 9 days, as set out at point 4.5.4 appears to be intended to show that subscribers were not deceived by the promotional competition complained of (and similarly at point 4.8.3). The panel fails to see how these bare statistics can show anything of the kind, particularly without knowing which "subscribers" these were, and whether or not they believed they were in line for a prize, in addition to subscribing to the service. This is a mere statement of opinion and doesn't make the argument true, nor does it prove the absence of breach.
- 5.4 The IP and its attorneys seem to have taken the point that changes were required to the advertisements and promotions and to that end have made more changes. This suggests that there was some change possible and desirable. As a result, it would seem that the IP's first promotion did not in fact comply with the requirements of the Code, alternatively that there was some very real room for improvement.
- 5.5 We have made this point in other appeals too, but restate it here. A breach of the Code is a breach – it does not matter whether or not there are mitigating factors – these are taken into account in determining the sanction, not the fact of a breach.
- 5.6 The fact that not many people complained is not relevant to the fact of a breach, it may mean simply that some people are not aware of the WASPA mechanisms for complaints, alternatively that they couldn't be bothered to complain. It does not detract from the potential harm that could be suffered, or from the fact that those – even if they are few – that were harmed, were harmed because of a breach of the Code.
- 5.7 On the facts, and taking into account the steps that the IP took following the emergency panel hearing, which are commendable but which were also taken into account by the adjudicator in applying sanctions, we find the IP to have breached the Code and specifically sections 9.1.6 and 11.1 and 11.2, for the same reasons and based on the same facts and argument as set out in the adjudicator's report. The prompt termination by the IP was, we assume, the reason for the low fine.
- 5.8 The appeal is dismissed. The appeals fee is not refundable.